



## New REPC and New REPC for Residential Construction Effective January 1, 1999

### ***Real Estate Purchase Contract for Residential Construction***

The real estate industry has been waiting for a long time (how's ten years?) for a new version of a purchase agreement for new homes that are under construction. The committees have met and worked and reworked a new form. The final product has been approved by the Real Estate Commission. The Attorney General's office has signed off on the form, and the new state approved form is now ready and available for use across the state.

The old construction agreement was called the Earnest Money Sales Agreement for Residential Construction, and its effective date was October 1, 1988. For quite a few years, even though the form was so old, with adaptations, it was working moderately well. Also, UCA Section 61-2-20(2) states that "real estate licensees may fill out real estate forms prepared by legal counsel of the buyer [or] seller . . ." That language allowed Utah licensees to fill out the forms of many of the larger developers that had been prepared by their (the developers') legal counsel. For those reasons, there was less immediate push to develop a new construction agreement.

But the time was finally at hand and the EMSARC (Earnest Money Sales Agreement for Residential Construction) had worn out. The forms committees completed the long overdue task.

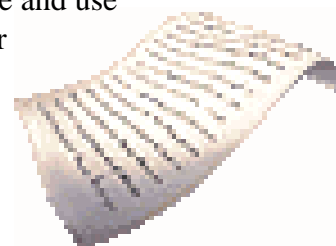
The format for the REPC/RC follows closely to the standard REPC form. The *1999 Core Course* provides a good training session on how to use the form. There will be other CE courses soon to follow.

### ***Standard Real Estate Purchase Contract***

The revised, new and improved Real Estate Purchase Contract is now available. The effective date of its use is January 1, 1999. Let the Division know how the new form works in the real world.

### ***Revised FHA Addendum***

In order to comply with federal rules, this addendum has been modified. If the date at the bottom of your form reads December 29, 1998, you are using the corrected form. If it is any other date, you need to destroy the form(s) you have and use the updated version. If your normal vendor does not have the updated form, you can download it from the Department of Commerce web site at [www.commerce.state.ut.us](http://www.commerce.state.ut.us).



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## The Double Contract Rears its Head Again

by Ted Boyer, Division Director

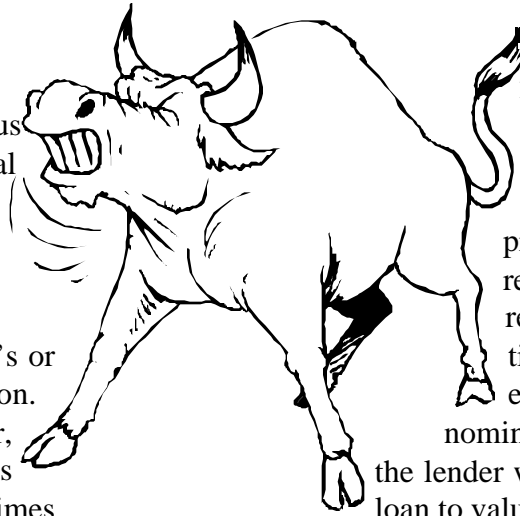
The Division is once again receiving numerous complaints about the use of double contracts in real estate transactions. Perhaps it is a reflection of market conditions or perhaps this old device has been rediscovered.

In classic double contracting, two separate REPC's or purchase agreements are used for a single transaction. One REPC is disclosed to the lender and the other, which contains the actual terms of the transaction, is kept secretly between the buyer and seller. Sometimes the second contract is in the form of a side agreement or addendum to the REPC which is concealed from the lender.

The purpose of the scheme is usually to trick the lender into loaning 100% or more of the purchase price. Using an inflated appraisal, the buyer offers to purchase the property for more than the list price. The inflated offer typically shows a down payment which does not exist or which is refunded to the buyer immediately after closing. The buyer then obtains financing for 80% or 90% of the inflated price, which is in reality, 100% or more of the actual purchase. The Seller ends up with the original sales price paid from the buyer's loan proceeds, the buyer ends up with the property without putting any money down, the appraiser receives a fee for the inflated appraisal, and the lender ends up with a 100% loan to value (or greater) loan to a buyer who has invested nothing and has perpetrated a fraud.

We are now seeing interesting variations on this age-old scheme. For example, an offer is presented at more than the list price with the seller to carry back a portion of the sales price as seller financing, secured by a second deed of trust. In a separate agreement, the seller agrees to forgive the second trust deed and deliver a reconveyance after closing or the second deed of trust is destroyed after closing without ever being recorded.

Another even more diabolical variation goes like this. An offer is made at more than asking price with a sizable



down payment (say 25%) to be made in the form of tradable securities or other valuable personal property. The buyer retains an option to repurchase the securities or personal property after closing for a nominal amount, leaving the lender with a 100% or more loan to value.

We have seen another variation which I call the "sweatless equity" program. The so-called "sweat equity" is shown as a credit on the offer and on the closing statement but the labor is not contributed until after closing, if it is provided at all, again resulting in a 100% or greater loan to value.

Did I forget to mention that all of the loan fees and closing costs are built into the loan amount?

Occasionally a purchase money mortgage is characterized as a refinance or a "purchase/refinance" to avoid payment of private mortgage insurance or to avoid other restrictions. A complicit lender, usually a mortgage broker rather than a financial institution, initiates a loan application prior to closing in the name of the seller and buyer. When the loan closes, the seller mysteriously does not appear on any of the loan documents. The loan is then sold in the secondary market to an unsuspecting purchaser who thinks he has purchased the refinance of a seasoned performing loan with a credit-worthy borrower and the lender has required no private mortgage insurance. The problem with this scenario is that it is fraudulent and misleading. In common usage and under federal law, refinancing means a transaction in which an existing obligation that was subject to a secured lien on residential real property is satisfied and replaced by a new obligation undertaken by the same borrower.

One might ask, “What is wrong with that?” The buyer gets into a home, the seller has sold his home and the real estate agent, appraiser and mortgage broker all earn fees. Well, there are numerous problems and there is plenty of blame to go around.

The appraiser who has prepared the inflated appraisal has undoubtedly violated the Uniform Standards Of Professional Appraisal Practice (“USPAP”) which govern appraisal work in Utah and throughout the United States, thus placing his or her license in jeopardy.

The agent or broker who suggests or utilizes these schemes is, at a minimum, in violation of Rule R162-6-1 which prohibits the use of double contracts; is in breach of fiduciary duties under Rule R162-6.2; and is in violation of Utah Code § 61-2-11 for making a substantial misrepresentation, for making false promises, for being unworthy or incompetent and for being unprofessional. The actions of the agent or broker could also be the basis for a claim for civil damages.

Let us turn for a moment to federal law. While the Division does not enforce federal law, a brief review is instructive. First, the word “lender” means the person or entity who is actually providing the funding for the loan transaction. In the above situations this is usually the purchaser of the loan immediately after or simultaneously with the closing. It is this purchaser of the loan who has been deceived and who stands to lose on a loan that should never have been made. It is also possible the buyer may suffer financially if a job is lost or buyer is transferred and cannot sell the property for a high enough price to cover the 100% or greater mortgage, closing costs and commissions. If the loan becomes a federally related transaction by being sold to an insured institution or by other means, federal law applies.

The Real Estate Settlement Procedures Act requires that all material terms be disclosed. There can be no side deals in a federally related transaction. Furthermore, whoever makes any false statement or report or willfully overvalues any land property or security for the purpose of influencing in any way the action of a federal agency or a federally insured institution such as the FDIC, the Office of Thrift Supervision, the Resolution Trust Corporation, etc. is subject to a fine of not more than \$1,000,000.00 or a sentence of thirty years in prison, or both. This is serious business. (See 18 United States Code §§ 1007-1014). For your information, we have been informed that the Federal Bureau of Investigation has assigned two special agents to investigate loan fraud in the State of Utah.

The old adage about a transaction which looks too good to be true usually is too good to be true is still good advice. Let's be honest and straightforward in our business dealings and in the way we treat our clients.

## It's a Federal Offense

Did you know that certain actions by real estate licensees may subject them to liability under federal law as well as state laws and Commission rules? For example, if a buyer or licensee has made or aided in the falsification of a loan application to a federally insured lender, including misstatement of purchase price, amount of down payment, or credit-worthiness of the loan applicant, those involved may be charged with felonies punishable by up to 30 years in prison and/or a \$1,000,000 fine. (See 18 U.S.C. Section 371.)



## Utah Real Estate News

**Purpose:** To provide licensees with the information and education they need to be successful in competently serving the real estate consumer

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## Broker Beware! Avoid a \$500 Fine

Many Utah Principal Brokers are not paying enough attention to the fact that some of the licensees affiliated with their offices may, in fact, be working with either *no* license, or an *expired* license. Section 61-2-7 of the Uniform Code says, "The wall licenses of principal brokers, associate brokers, and sales agents who are affiliated with an office shall be kept in the office to be made available on request."

If you do not have a hard-copy green license in your office for *each* sales agent or associate broker actively affiliated with you, you have big problem. The problem? *You are in violation of the law!*

The Real Estate Commission has determined that any principal broker who allows an un-licensed person to perform activities for which a license is required, will be fined \$500. Each licensee is responsible for his/her own license. But *YOU* are responsible to make certain those who are affiliated with your office are, in fact, actively licensed.

### Approved Forms on Home Page

All of the real estate forms that have been approved by the Utah Real Estate Commission and the Attorney Generals Office, can be found on the Utah Department of Commerce home page. The address is:

[www.commerce.state.ut.us](http://www.commerce.state.ut.us).



It is NEVER a good idea to sign documents on behalf of your principal.

We're not talking here about the obvious bad faith act of forging someone's signature. We're talking about the real estate licensee who honestly believes that when working as an agent, he has the legal authority to bind his principal to a contract. We've seen this happen in two ways: 1)The agent signs: Benjamin Buyer by Andrea Agent; or 2)The agent signs: Samuel Seller, accepted by telephone conversation. Both are bad practice.

The Statute of Frauds says that, to be enforceable, a contract for the sale of an interest in real property must be in writing. This does not mean that only the terms of the agreement will be in writing. It means that the parties themselves must sign, evidencing their agreement to the terms. If an agent signs for a principal without having a written power of attorney, he runs the risk that the contract will be unenforceable.

It stands to reason that an agent who has committed such an inadvisable act might be held liable for damages to the party who relied upon the enforceability of the contract.

If an agent writes on a contract that a party has "accepted per telephone

## Think Before You Sign

conversation," she runs the same risk that the contract will be unenforceable.

The agent's written statement that the principal accepted verbally does not transform a verbal agreement to a written acceptance which will legally bind the party to the contract.

The **ONLY** time a real estate licensee may sign an agreement for a principal is when he/she has a valid power of attorney from that individual.

There have been cases in which buyers or sellers have changed their minds about an agreement and have used the lack of proper signatures as a way of negating the transaction.

When that happens, you can almost count on the fact that a licensee who signed the documents without written power of attorney will be drawn into the ensuing lawsuit.

There is a good chance that a licensee in such a situation would also have action taken against his license by the Commission.

Avoid this costly mistake by ensuring that **ONLY** the principals sign for themselves in any real estate transaction.

Reprinted from the *Alaska Real Estate News*

## Why Are There So Many Disciplinary Sanctions Lately?

Our Utah real estate licensees are noticing the obvious increase in the number of disciplinary sanctions that are appearing in the Utah Real Estate News. Does this mean that more of our Utah licensees are getting themselves in trouble? Or, does it mean that the Division of Real Estate is getting more aggressive in its discovery of errant licensees? The answer is yes, and no.

One of the most obvious differences is the fact that our real estate applicants for a new license are now being fingerprinted. At the time of taking the pre-license exam, each applicant is required to complete a questionnaire that asks about the candidate's worthiness to hold a real estate license. If the candidate indicates on the questionnaire that there have been no problems with the law in the past, the Division will proceed with licensing.

However, if after the candidate has been licensed, and reports come back from the Bureau of Criminal Identification and/or the FBI that the candidate does, indeed, have a criminal background that was not disclosed, the candidate's license will be *automatically* revoked! The candidate will have an opportunity to appear before the Real Estate Commission for a "post-revocation hearing," but if it is determined that the candidate deliberately lied on the questionnaire, the revocation is usually upheld. That revocation is a licensing sanction that will then appear in the newsletter.

The Division has streamlined its enforcement efforts and is resolving cases more quickly. Also, many of our errant licensees are agreeing to "stipulate" to a sanction. This means that the licensee agrees that what he/she did was wrong, and negotiates with the Division as to what the sanction should be. It's an administrative form of a plea bargain. When you read the disciplinary sanctions in the newsletter, and you see that the licensee "consented" to a specific sanction, you will know that it's a stipulated agreement.

As with a plea bargain, it saves a lot of time and money for both the Division and the licensee, and saves the licensee from going to a "full-blown" hearing.

No one likes to see his or her name in that section of the newsletter, and sometimes friends or brokers call the Division wondering if we aren't being too "heavy handed" and perhaps adding insult to injury. However, we have equally as many phone calls saying, "Thanks. I just read about an action in your newsletter that I've been doing that I didn't know was that serious. Thanks for the education!" (Of course, the call is usually anonymous.)


The Disciplinary Sanctions section in the newsletter is an invaluable tool. We hope you will use it as such.



### In Memoriam

The Division of Real Estate expresses condolences to the families of the following real estate licensees who have recently passed away:

William R. Ball	Riverton
J. Eldon Checketts	Ogden
Joyce Cummock	Las Vegas, NV
Vernal W. Dishon	Salt Lake City
Michael Donovan	American Fork
Hooshang Shabestari	Salt Lake City

 Read your  
administrative rules  
*frequently.*  
It pays to remember  
them!



## Disciplinary Sanctions

**ANTHONY, LEONARD B.**, Principal Broker, CastleRock Real Estate, L.C., Orem. Consented to pay a \$200.00 fine based on a rule violation. Anthony failed to change the name of his brokerage with the Division when the name was changed from KEB Realty to CastleRock Real Estate, L.C. #RE98-08-02.

**BENSON, SHAR LYNN**, Shar's Realty, Roosevelt. Broker's license application approved on the conditions that the license shall be on probationary status for two years, and that there shall be no substantiated complaints against Ms. Benson related to contract formation, agency disclosure, or incomplete files during the probationary period.

**BIGELOW, KEITH**, Sales Agent, Salt Lake City. Conditional license revoked on October 20, 1998 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history on his application for a license. #REFP98-13.

**BRASSARD, THEODORE**, Principal Broker, Salt Lake City. License renewed on probationary status based on having a civil judgment entered against him in connection with a timeshare sale and on having acted carelessly in the timeshare sale by failing to verify the exchange privileges he represented that the timeshare unit would have.

**BUTCHER, BLAINE R.**, Sales Agent, Salt Lake City. Mr. Butcher's conditional real estate license was revoked on October 20, 1998 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history at the time of application. After a post-revocation hearing, the Commission and the Division found that Mr. Butcher had not intentionally failed to disclose criminal convictions from the 1960's and 1970's and reinstated his sales agent license on a probationary status for two years. During the probationary period, he will be required to submit written verification from each broker with whom he licenses that he has disclosed his past convictions to the broker. #REFP98-14.

**CAMERON, KEVIN M.**, Branch Broker, Wardley Better Homes & Gardens, Ogden Branch. Consented to pay a \$500.00 fine based on failing to submit a change card to the Division in a timely fashion and on functioning as a branch manager while he held only a sales agent license. Cameron maintains that he understood from senior management at the brokerage that it was acceptable for him to act as the branch manager until he obtained his broker's license and registered with the Division as the Branch Broker. #RE98-07-07.

**CHILDS, ROBERT C.**, Principal Broker, Coldwell Banker Professional Realty, Gunnison. Consented to pay a \$500.00 fine and complete the Division Trust Account Seminar and an agency

course, based on failing to exercise reasonable supervision, breaching a fiduciary duty, and failing to maintain in-compliance trust account records. Childs' sales agent used a standard REPC instead of a construction contract for a home under construction, failed to have agency agreements and consent to limited agency signed timely, and failed to promptly disclose to the sellers in a transaction that the buyers had not made their \$5,000.00 deposit. In addition, Childs failed to maintain individual trust ledgers and to perform monthly trust account reconciliations. #RE33-98-13.

**CHRISTIANSEN, CHARLOTTE**, Principal Broker, C-21 Central Realty, Gunnison. Consented to pay a \$400.00 fine and complete a 3-hour course in agency based on failing to adequately supervise a sales agent who filled out a REPC indicating that he represented both buyers and sellers but that his principal broker represented sellers only, and by not requiring that a seller property condition disclosure be obtained from the sellers and furnished to the buyers in the transaction. #RE96-05-11.

**ELTINGE, KENNARD M.**, Principal Broker, Park City. License renewed on probationary status based on having been convicted of misdemeanor zoning violations in Evanston, Wyoming in connection with the operation of a sexually oriented business. The conviction is on appeal, and the probationary status on his license will be terminated should the conviction be reversed on appeal.

**FORD, TED S.**, Sales Agent, Salt Lake City. Consented to pay a \$500.00 fine and complete courses in agency and the REPC, based on rules violations and breach of fiduciary duty. Ford receipted a \$1,000.00 earnest money deposit which he did not actually receive until 8 days later and failed to obtain informed, written consent to limited agency. Ford also failed to obtain the parties' signature on an extension, and after the failure of the transaction, he erroneously advised the sellers that they needed to release the earnest money to the buyers. Ford maintains that any breach of fiduciary duty was unintentional and that he expended great effort in an attempt to bring the transaction to closing in order to benefit both sides of the transaction. #RE96-05-22.

**FOX, BRENDA K.**, Inactive Sales Agent, St. George. Application for renewal denied based on conviction of 3rd degree felony Possession of a Controlled Substance and Class B misdemeanor Possession of a Controlled Substance.

**FOX, JAMES DANIEL**, Associate Broker, Allpro Realty Group, Salt Lake City. Consented to pay a \$400.00 fine based on distributing a solicitation which offered a \$500.00 commission upon the closing of a sale for referrals of prospects. The advertising included the name, "Foxco, L.L.C." instead of the name of the brokerage with which he was licensed. Fox maintained in mitigation that as soon as he was contacted by the Division, he

discontinued the solicitation and that no referral commissions were actually paid by him to unlicensed persons. #RE97-09-01.

FREHNER, CARY, Inactive Sales Agent, Cedar City. After he did not appear at a hearing scheduled before the Commission, Mr. Frehner's application for renewal was denied based on multiple criminal convictions, some of which were very recent, his failure to disclose some of the convictions to the Division, and the fact that he is still on criminal probation.

HALES, DON C., Principal Broker, Don Hales Construction & Realty, Salt Lake City. Consented to pay a \$500.00 fine and complete the Division Trust Account Seminar plus a course in the real estate administrative rules. Hales used an earnest money deposit from one buyer on construction jobs for other buyers and failed to remit the earnest money deposit in a timely manner after the failure of the transaction. Hales refunded the deposit to the buyers soon after the buyers complained to the Division. #RE94-05-06.

HARTMANN, CONNIE L. (WELLS), Sales Agent, C-21 Golden Spike Realty, Sunset. Consented to pay a \$300.00 fine and complete a 2-hour course in the real estate administrative rules, based on receipting earnest money which she had not received and not immediately notifying the listing brokerage that she was not able to obtain the earnest money. In mitigation, Hartmann maintains that she trusted the buyer to deliver the earnest money to her because he was at the time her daughter's fiancé, but that her trust in him turned out to be misplaced. #RE97-02-05.

HICKMAN, BRIAN T., Sales Agent, St. George. Mr. Hickman's conditional real estate license was revoked October 19, 1998 after the criminal background check required of new sales agents revealed that he had not accurately disclosed his criminal history at the time of application. After a post-revocation hearing, the Commission and the Division found that Mr. Hickman had not intentionally failed to disclose a shoplifting conviction and reinstated his sales agent license, but suspended it for 90 days and placed it on probation thereafter for the balance of his initial licensing period as a sanction for failing to disclose the conviction at the time of application. REFP98-11.

JACKSON, SHAUNA E., Expired Sales Agent, St. George. Application for reinstatement of expired sales agent license denied based on conviction of 3rd degree felony Possession of a Controlled Substance, Class B misdemeanor Possession of a Controlled Substance, and Class B misdemeanor Possession of Drug Paraphernalia.

JOHNSON, JEFFREY H., Sales Agent, The Healey Company, Salt Lake City. License renewed on probationary status due to a recent guilty plea in abeyance to misdemeanor Violation of a Protective Order. Mr. Johnson shall be required to notify all principal brokers with whom he licenses during the two-year probationary period about the guilty plea and to submit written evidence to the Division that each broker has been notified.

LIND, RICHARD E., Unlicensed, South Jordan. Cease and Desist Order issued July 23, 1998, prohibiting acting as a sales agent on behalf of others or holding himself out as a "selling agent." Mr. Lind requested a hearing on the Cease and Desist Order and subsequently entered into a settlement agreement with the Division in which he agreed that he would not help customers for his new construction to find buyers for their existing homes or assist prospective buyers of the existing homes of his customers in their efforts to qualify for financing. #RE98-07-06.

MANNING, CAROLYN R., Sales Agent, Manning & Associates, Inc., Salt Lake City. After a formal hearing, any residual rights which Ms. Manning had in her expired license were revoked effective January 8, 1999. Among other violations, Ms. Manning breached her fiduciary duty to buyers who were her clients by inserting herself into their transaction for her own financial gain. Through Carmen, LLC, an entity in which she was the president, managing member, and registered agent, Ms. Manning purchased the property in which her clients were interested and then resold it to them for over \$7,000 more than the price she paid for the property without disclosing to them her status as the seller of the property or the fact that they could have purchased the property for less from the original seller. #RE95-12-09.

MCCLELLAN, JANICE, Sales Agent, Coldwell Banker Professional Realty, Gunnison. Consented to pay a \$500.00 fine and complete a course in agency, based on rules violations and breach of fiduciary duty. McClellan used a REPC for a home under construction, failed to obtain a signed agency agreement and consent to limited agency from the seller prior to the time the parties signed the REPC, and failed to promptly inform the seller that the buyers did not make their \$5,000.00 deposit. #RE98-11-13.

O'BRIEN, GARY, Principal Broker and operator of O'Brien Schools, Salt Lake City. Consented to surrender his certification to operate a real estate school to the Division by January 14, 1999, and agreed not to reapply for a new certificate for at least five years, based on using videotapes for courses which were approved as live instructor courses, repeatedly representing over the course of several years that he would use live instructors and then giving continuing education credit for videotaped classes, giving a student 3 hours of continuing education credit for viewing only one hour of a videotape, and plagiarizing from copyrighted textbooks and using the materials as his own. Mr. O'Brien will retain his instructor certification and may act as an instructor for approved real estate courses for schools in which he has no ownership interest or management responsibilities. #RE97-11-14.

OGDEN, WAYNE R., Sales Agent, Ogden. License revoked by default, effective February 19, 1999, based on conviction of a criminal offense involving moral turpitude. Ogden pled guilty to communications fraud, theft by deception, money laundering, and a pattern of unlawful activities, all second degree felonies. He was

## Disciplinary Sanctions

*continued from page 7*

sentenced on July 6, 1998 to serve an indeterminate terms of 2-30 years in the Utah State Prison. He was also ordered to make restitution of amounts paid to him by his investors. #RE98-05-13.

PULSIPHER, F. LAUREL, Associate Broker, Ogden. Consented to surrender his license effective October 14, 1998, and not to reapply for four years, based on revocation of his Nevada broker's license. The Nevada Real Estate Commission found that Mr. Pulsipher had failed to adequately supervise the activities of two agents for whom he had assumed supervisory responsibilities, and that he had failed to maintain real estate records. The two agents were involved in a sales program in which sellers were coached about how to sell their homes to an investor using fraudulent financing techniques. #RE98-08-01.

RADDATZ, RICHARD C., Sales Agent, Salt Lake City. License granted on probationary status for six months.

SWENSON, MICHAEL E., Sales Agent, Provo. Conditional license revoked on October 20, 1998 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history on his application for a license. #REFP98-12.

THORNTON, KENNETH, Sales Agent, Salt Lake City. Conditional license revoked on November 16, 1998 after the criminal background check required of new sales agents revealed that he had failed to accurately disclose his criminal history on his application for a license. #REFP98-15.

WEBB, PAUL T., Principal Broker, Recreation Realty, Garden City. Consented to pay a \$100.00 fine based on leaving an advertisement for property on his brokerage Internet page after the expiration of the listing. Respondent maintained in mitigation that at the time the listing expired, he did not know how to change files on the page and his web page designer did not know the listing needed to be removed. Respondent further maintains that he has since learned how to add and remove files from the web page as needed. #RE98-06-12.

WELSH, LARRY K., Principal Broker, Coldwell Banker Gold Key Realty, Inc., Logan. Consented to: 1) deposit sufficient funds into the brokerage property management trust account to cure the discrepancy found by the Division's audit; 2) pay a \$250.00 fine; 3) employ a CPA to institute accounting procedures for the brokerage and oversee the monthly property management trust account reconciliation for six months; and 4) have his license placed on probationary status for two years. The Division's audit of the brokerage property management trust account indicated a \$23,149.84 shortage. Welsh maintains that the shortage occurred prior to his assuming responsibility for the company and that if he had been reconciling the account as required, he would have

discovered and remedied the discrepancy prior to the Division's audit. #RE33-94-28.

WILLIAMS, WESLEY B., Principal Broker, Castle Homes L.L.C., Sandy. Consented to pay a \$200.00 fine, based on violating Division advertising rules by using a Castle Homes brochure which he did not notice identified Alan J. Prince as a real estate broker although Mr. Prince had not held a license since January, 1996. Mr. Williams maintains that the brochures were very expensive, and that, in trying to use them up, the text concerning Mr. Prince was overlooked. #RE98-06-13.

WINSOR, INGER J., PINE MOUNTAIN REALTY, L.L.C., WAPITI HEIGHTS, L.L.C., and RICHARD M. MCDONALD, Salt Lake County. A Permanent Restraining Order was issued by the Third District Court on December 10, 1998 prohibiting violation of the Utah Land Sales Practices Act by offering, selling, or disposing of any interest in the Rose Creek Estates, Harmony Hills, or other subdivisions until such time as the subdivisions are registered with the Division. The Division had issued a Cease and Desist Order on December 6, 1996, prohibiting marketing of Rose Creeks Estates and Harmony Hills, but the defendants had continued to market the subdivisions in violation of the Cease and Desist Order. Third Judicial District Case #980912512.

WINSTEAD, WILLIAM, formerly Associate Broker with Deer Valley Realtors, Inc., Park City. Consented to pay a \$5,000.00 fine, have his license placed on probation for two years, and complete an 8-hour remedial education requirement. Mr. Winstead deposited earnest money into an account he maintained himself instead of into the brokerage trust account, and paid himself real estate commissions from that account. #RE94-12-08.

### TRUST ACCOUNT SEMINAR

The seminar will cover the Administrative Rules for trust accounts established under the Utah Real Estate license law.

**Location:** 2970 East 3300 South, Salt Lake City

**Dates:** March 5, April 9, May 7, June 4

**Time:** 9:00 am to 12:00 noon

**Credit:** 3 hours continuing education

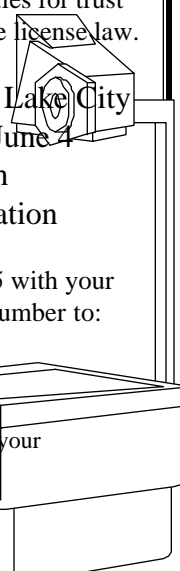
You **MUST PREREGISTER** by sending \$5 with your name, address, phone number and license number to:

**Division of Real Estate**

**PO Box 146711**

**Salt Lake City, UT 84114-6711**

You will receive a phone call confirming your registration the week of the seminar.



# One Sales Commission or Your License And Livelihood . . . Which Is More Important to You?

*(even though the following happened in New Jersey, the same lessons can be learned by Utah Licensees)*

In the Disciplinary Action Reports the case of salesperson Joseph Sidoti is discussed. Mr. Sidoti was the victim of apparent con-artists who, for some as yet undetermined reasons, posed as serious buyers of a \$505,000 property in Brick Township. The buyers delivered 3 checks totaling \$72,500 in deposit monies to Sidoti. Unfortunately, the checks were all drawn on a closed account and were never honored after being deposited into his broker's trust account.

Like other licensees who have made the same mistake, upon learning that the first two checks totaling \$42,500.00 were dishonored, Sidoti got his priorities mixed up. Instead of immediately informing the seller, or listing salesperson, or seller's attorney that, contrary to the terms of the contract, the deposits which were to have been paid to and held in trust by his broker had in fact not been paid, he attempted to keep the deal together by hounding the buyers to make good on the deposits. Despite their repeated verbal assurances that they would do so, they never did.

All licensees are reminded that when their firms act as an escrow agent or trustee, they owe fiduciary duties to both parties to the escrow arrangement. Among those are the

duty to make full disclosure of all information material to the escrow transaction. It cannot seriously be argued that notification that the checks paying the deposit monies were dishonored is not material to the interests of the seller. If payment of the deposit was not a material obligation on the part of the buyers, it would not be required by the terms of the contract! Consequently, in all cases such information should immediately be conveyed to the seller, either directly or through the listing salesperson or the sellers' attorney. When doing so, the best practice would be for the notice to either be delivered or confirmed in writing.

In the case where a salesperson and selling broker are operating as buyers agents and holding deposit monies paid by their client in trust or in escrow, their fiduciary duties to the buyer are not superseded, but rather are qualified by their obligations to the seller which flow from the broker's assuming the role of escrow agent.

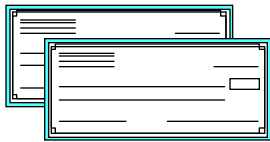
It seems safe to say that most objective persons would conclude that the delivery of bad checks in payment of deposit monies constitutes a material breach of the contract by the buyer. Whether to arrive at that conclusion, and what steps to take after doing so are decisions for the principal in the relationship, not the agent, to make.

But if the sellers are not informed that the check or checks paying the deposit were dishonored they are deprived of the opportunity to evaluate the situation and decide upon a course of action. It is not for the agent to decide: (1) that the only course of action to be followed is to attempt to keep the deal together; and (2) that they alone, and not the sellers and their attorney, should pursue that objective.

Clearly, if a deposit check is dishonored through no fault of a buyer, the bank error or other problem can be swiftly rectified, truthful explanations provided to all concerned, and the transaction can move forward. Where the buyer has not acted in bad faith, the potential down-side of prompt and full disclosure to all parties is minimal. However, the potential for catastrophe is so great where sellers and licensees encounter scam artists like those with whom Mr. Sidoti dealt, the dictates of common sense as well as those of the Commission's Rules and the laws of agency compel prompt and full disclosure.

As Mr. Sidoti and other licensees who found themselves in similar situations have learned, the price of disregarding those dictates can be high.

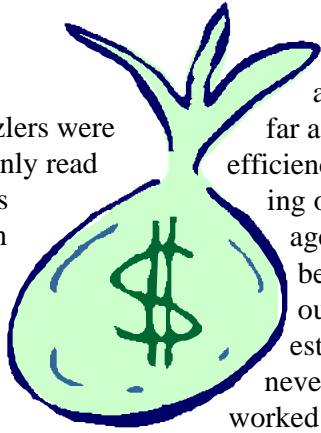
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# Embezzlement - That Could Never Happen to me

by Ron Pollard

Or so I thought. Embezzlers were a class of thieves I had only read about. I pictured them as white collar businessmen in large corporations who would have no interest in small everyday business where the pickings were slim.



other agency Realtors in an outstanding manner. As far as I could ascertain, she was efficiency personified in overseeing our books, accounts and agent contracts. She quickly became a loved member of our small but very close real estate family. She would never forget a birthday and worked hard in many ways to ingratiate herself with each individual member of our organization.

My story is one of lifelong trust in people close to me. This necessity of trust was magnified during my 20 years as a carrier Naval Aviator. This type of complete trust in your squadron mates could literally mean the difference between life and death.

I brought this type of trust into my next career as a broker and owner of relatively small real estate sales organizations. I would train and oversee my office managers to the extent I was satisfied of their competence and integrity in all aspects of their duties which ultimately included complete maintenance of the check-book and accounts. I was comfortable in this scenario as we were a small organization which was easy to keep an eye on and we never had a real problem with any of our real estate commission audits. The complete trust I had in my first ten years of office managers was never abused.

The above scenario set me up nicely for what happened next. I hired a matronly lady whom I had casual contact with previously in a related business. She quickly proved to be perfectly suited to our needs. She handled our clients, customers and

At this time our organization began a rapid expansion and I preoccupied myself with guiding this growth in a manner to allow it to rise to the top in our real estate community. This, along with my need to sell real estate, was a full-time job. Because of the increasingly heavy load this rapid increase in business was placing on her, I commenced a number of goals and procedures designed to streamline the accounts and related book-keeping. I dismissed her "feet dragging" on the implementation of these programs as she was just too busy with the everyday business. I was still comfortable because of my trust in her and the fact that our business, due to the 100% commission concept, was a cash in and cash out with no profit center to steal from. Additionally, she had successfully been through real estate commission audits in the past. (I later found out that a clever embezzler with complete control of the books can often fool an auditor if given enough advance warning of an audit.)

Does the above scenario sound similar to yours? If so, get wise quickly! She was caught on our last

audit with what, on the surface, looked like a couple of minor deposit mistakes. This led me to do something I should have done a long time ago. I hired a bookkeeper to take over all accounts, and her investigation discovered that our beloved and trusted office manager had been cleverly stealing money from our accounts for years amounting to many tens of thousands of dollars. It is now apparent that she came to work every day to lie and steal.

I have since learned a lot about embezzlement. First of all, it is rampant in both large and small businesses throughout the country. If is a disease where once started, most often becomes an obsession which the embezzler cannot stop until caught. It is an addiction!

I now realize that trust, especially absolute trust, should have nothing to do with proper control of records and accounts, especially where public monies are involved. I don't have to tell you what procedures to use; they are logical and well published. I now realize that every business can be vulnerable unless they are set up properly.

The final thought I will leave you with is this: if you've never been in the type of situation we found ourselves in, you can't imagine the many ways it hurts. *(The company partnership was responsible to repay the missing funds, and Mr. Pollard, being and feeling ultimately responsible, personally repaid a significant portion of the shortage.)*

(Used by permission from the *Colorado Real Estate News*, November 1998)

## Purchase and Sale: No Liquidated Damages When No Loss

The enforcement of a liquidated damage clause in a real estate sales contract is an issue on which the nation's courts seem almost equally divided. While all courts agree that a "penalty" in a contract is unenforceable (because only a government can enforce a penalty), and agree that a penalty exists when the damages are clearly disproportionate to the real damages suffered by the innocent party, they disagree as to the point in time when the determination should be made.

On the one hand, a slim majority of jurisdictions (22 of 42 that have ruled on the issue) favor a "single look" approach, which tests the validity of the liquidated damage clause only as of the time of the contract. The remaining 20 jurisdictions require in some circumstances a "second look" as of the time of the breach and the relationship between the liquidated damage amount and the damage actually suffered by the injured party.

The Massachusetts courts are included in the latter category, as is illustrated in the recent case of *Kelly v. Marx*. 1998 WL 254509 (Mass.App.Ct.).

The case involved a contract to sell a home in Worcester for \$355,000. The buyer made a down-payment of \$17,750, or five percent of the purchase price, with a closing contemplated on September 1, 1994. The contract included the standard liquidated damage clause.

Subsequently, the buyer authorized the sellers to try to find another buyer, saying that even if this could not be done, the original buyer would not go through with the purchase unless he found a buyer for his home.

Prior to September 1, the sellers did find another buyer willing to pay \$360,000, \$5,000 more than the original price. The new buyer took title to the property on September 20, at which point the original buyer sued to recover the down-payment of \$17,750. Both parties moved for summary judgment. The trial court ruled in favor of the sellers and the original buyer appealed.

The first look at the facts would have permitted the sellers to keep the down-payment, said the court. At the time the contract was made, not only were the potential damages from a breach by the buyer difficult to predict, but the amount of the deposit (five percent) was within the ordinary range for a real estate contract. In short, at the time of contract, the liquidated damage clause was objectively fair to both parties.

The trial court, following the Massachusetts rule, took a second look as of the time of the breach. The judge acknowledged that the evidence showed that the sellers incurred no actual damages (which arguably might have resulted from additional expenses for mortgage servicing, property taxes and legal fees). The judge drew this conclusion from the failure of the sellers to claim any quantifiable damages.

The trial judge nevertheless ruled that the sellers could keep the down-payment because the amount was "neither unreasonable nor excessive under the circumstances of the breach, the overall value of the contract, and the customary nature of this type of a deposit."

It was at this point that the appellate court disagreed. If there were no damages to liquidate, there was no reason to permit the sellers to keep the liquidated damage amount. The bottom line, said the appellate court, is the principle that liquidated damages must compensate for loss rather than punish for breach. Consequently, it reversed the trial court and denied any damages to the sellers. (In a footnote to its opinion, the appellate court listed the 42 states that have ruled on this issue.)

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### remember



***You Must Notify the Division Within 10 Days in Writing of--***

- a change of personal address;
- a change of business address;
- a change of name;
- a change of personal or business telephone number